

1 **APPEARANCES CONTINUED:**

2 **JOHN ANDRADE, ESQ.**
3 **Parkowski, Guerke & Swayze, P.A.**

4 **-and-**
5 **ALAN WRIGHT, ESQ.**
6 **HC Park & Associates**
7 **(Reston, VA)**

8 **Counsel for Pantech**

9 **PHILIP A. ROVNER, ESQ.**
10 **Potter Anderson & Corroon LLP**

11 **Counsel for General Imaging Co.**

12 **REX A. DONNELLY, ESQ.**
13 **Ratner Prestia**
14 **-and-**
15 **MICHAEL K. PLIMACK, ESQ., and**
16 **DAVID A. GARR, ESQ. (Washington, D.C.)**
17 **Covington & Burling LLP**
18 **(San Francisco, CA)**

19 **Counsel for Palm**

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1 THE COURT: Good morning. Is this the operator,
2 or do I have counsel?

3 UNIDENTIFIED SPEAKER: You have counsel, Your
4 Honor.

5 THE COURT: In the 08-139 action, please, let's
6 begin -- we have common plaintiff's counsel in both actions.
7 Let's start off with introductions of plaintiff's counsel,
8 please.

9 MR. JOHNSON: Yes, Your Honor. This is Edmond
10 Johnson from the Wilmington office of Pepper Hamilton on
11 behalf of FlashPoint, the plaintiff. I have with me today
12 Goutam Patnaik from our Washington, D.C. office.

13 THE COURT: Good morning.

14 Let's see. Who is appearing for HTC today?

15 MR. DAY: Good morning, Your Honor. For HTC,
16 you have John Day as Delaware counsel. With me on the line,
17 John Schnurer, Kevin Pitariu, and Joseph Reid from Perkins
18 Coie. To the extent Your Honor has any questions for HTC,
19 Mr. Schnurer will be handling them.

20 THE COURT: Thanks, counsel.

21 For Aiptek?

22 UNIDENTIFIED SPEAKER: Your Honor, I don't think
23 we have anyone from Aiptek on. We called in. They are the
24 only one who did not call in.

25 THE COURT: But we do have counsel both from

1 317, the 14-317 and the 08-391 action on the line. Correct?

2 UNIDENTIFIED SPEAKER: That's correct. There is
3 a total overlap on those two, actually.

4 THE COURT: Argus.

5 UNIDENTIFIED SPEAKER: Argus has no counsel,
6 Your Honor.

7 THE COURT: I am just going down the docket
8 sheet.

9 Bushnell.

10 MS. MATTERER: Good morning, Your Honor. This
11 is Mary Matterer from Morris James. I have with me Scott
12 Brown on behalf of Bushnell from the law firm of Hovey
13 Williams.

14 THE COURT: Good morning.

15 Do we still have DXG Technology?

16 MR. DiGIOVANNI: Yes, Your Honor. Good morning.
17 Frank DiGiovanni from Drinker Biddle & Reath for the two DXG
18 entities.

19 THE COURT: Good morning.

20 For GE?

21 General Electric?

22 UNIDENTIFIED SPEAKER: Your Honor, General
23 Electric is no longer in this matter.

24 THE COURT: Thank you.

25 Is International Norcent Tech still in the

1 matter?

2 UNIDENTIFIED SPEAKER: They are out of the
3 matter, Your Honor.

4 THE COURT: Leica?

5 UNIDENTIFIED SPEAKER: They are out of the
6 matter, Your Honor.

7 THE COURT: Minox.

8 UNIDENTIFIED SPEAKER: They are out as well.

9 THE COURT: Mustek?

10 MR. HUNTER: Travis Hunter from Richards Layton
11 & Finger. I have on the line with me Irfan Lateef from
12 Knobbe Martens.

13 THE COURT: Polaroid?

14 Polaroid is out?

15 Ritz Interactive, are they still in?

16 UNIDENTIFIED SPEAKER: They are out, Your Honor.

17 THE COURT: Sakar International.

18 MR. KIRK: For Sakar, Your Honor, this is
19 Richard Kirk from Bayard for Sakar International, doing
20 business as Digital Concepts.

21 THE COURT: Great. Thank you.

22 Tabata, is it, USA?

23 UNIDENTIFIED SPEAKER: They are out of the case,
24 Your Honor.

25 THE COURT: Target is still in?

1 UNIDENTIFIED SPEAKER: They are out, Your Honor.

2 THE COURT: Vistaquest?

3 UNIDENTIFIED SPEAKER: They are out, Your Honor.

4 THE COURT: VuPoint?

5 UNIDENTIFIED SPEAKER: They are out, Your Honor.

6 THE COURT: Walgreen? Are they out?

7 UNIDENTIFIED SPEAKER: They are out, Your Honor.

8 THE COURT: Wal-Mart is out?

9 UNIDENTIFIED SPEAKER: Yes.

10 THE COURT: AT&T Mobility.

11 UNIDENTIFIED SPEAKER: Out.

12 THE COURT: That is everybody. Right?

13 MR. ANDRADE: Your Honor, John Andrade from
14 Parkowski, Guerke & Swayze for Pantech. I have Alan Wright
15 from HC Park & Associates on the line.

16 THE COURT: Who else is on the line that hasn't
17 been identified?

18 MR. ROVNER: Your Honor, Phil Rovner from Potter
19 Anderson for defendant General Imaging in the 08-928 case.

20 MR. DONNELLY: Rex Donnelly from Ratner Prestia
21 for Palm. I have Michael Plimack and David Garr from
22 Covington & Burling on the line.

23 THE COURT: Good morning.

24 Anyone else?

25 Mr. Rovner, what was that civil action number

1 you just gave?

2 MR. ROVNER: 08-928.

3 THE COURT: Here are the action numbers I am
4 using, Mr. Rovner. I am using the consolidated 08-139. Is
5 that the one of which you are a part?

6 MR. ROVNER: Yes.

7 THE COURT: Let's get to my numbers. Okay?

8 I am already a little prickly, counsel, this
9 morning, having tried to digest 60 pages of joint status
10 reports. I don't understand this at all, and I am not going
11 to waste your time or mine with trying to get an explanation
12 as to why you would burden a judge with this kind of
13 nonsense.

14 I will say, "Garbage in, garbage out." We will
15 see what we end up with today, given the not altogether
16 clear statement of positions regarding various things that
17 appear in the two separate reports.

18 So let's begin with this:

19 It appears that HTC and the plaintiff,
20 FlashPoint, have a difference of view as to whether the 139
21 and 317 matters should be put on the same schedule. Am I
22 right about that?

23 MR. PATNAIK: Yes, Your Honor.

24 THE COURT: Please identify yourself. We have a
25 lot of lawyers on the line.

1 MR. PATNAIK: (Inaudible) for FlashPoint, Your
2 Honor.

3 THE COURT: Who is this?

4 MR. PATNAIK: Goutam Patnaik. I am in Pepper
5 Hamilton's Boston office, Your Honor.

6 THE COURT: In the 139 and the 317 status
7 reports, it appears that the defendants would prefer both of
8 these actions placed on the same schedule. Is that correct?

9 Somebody for the defendants, please speak up on
10 that?

11 MR. SCHNURER: That's correct, Your Honor. This
12 is John Schnurer for HTC. That is correct.

13 THE COURT: And the schedules, as best I can
14 tell, that the defendants have proposed are identical in
15 both status reports. Is that correct?

16 MR. SCHNURER: That's correct, Your Honor.

17 THE COURT: What is the defendants' proposal as
18 to, if I adopt your suggestion that we consolidate these
19 matters together for pretrial purposes, that we do about
20 trial at the end of the day? Go ahead.

21 MR. SCHNURER: From HTC's perspective, HTC would
22 like the cases tried separately. So a trial against HTC
23 separate from other defendants.

24 THE COURT: Each of the other defendants, are
25 you proposing separate trials for each one of your clients?

1 What is it that you are proposing?

2 I am going to hang up in a minute if somebody
3 doesn't speak up.

4 MR. DiGIOVANNI: Your Honor, for DXG.

5 Our proposal, our preference would be to have a
6 conference at some point closer to trial. Our current
7 position is we would want separate trials. But we would be
8 willing to discuss it later in the case to see if that truly
9 makes sense.

10 THE COURT: Thanks for speaking up, Mr.

11 DiGiovanni. And thanks for making sense when you did so.

12 HTC, are you proposing that on the matter that
13 was transferred here from North Carolina that I adopt the
14 North Carolina Judge's schedule?

15 MR. SCHNURER: No, Your Honor.

16 THE COURT: I don't mean HTC. I misspoke. I
17 think I meant the plaintiff, FlashPoint.

18 MR. PUTNAIK: Your Honor, we did seek that the
19 schedule be maintained to the best -- just sliding the dates
20 to account for the lag based on the transfer.

21 THE COURT: How would you imagine, counsel,
22 given this Court's docket, this Judge's over 300, well over
23 300 patent cases, I might accommodate such an outlandish
24 request? Obviously, that is a rhetorical question.

25 MR. PATNAIK: Your Honor, that was the basis for

1 why we didn't want the transfer. We thought we were on a
2 good track in North Carolina.

3 THE COURT: That wasn't my call. As far as I am
4 concerned, I wish the North Carolina judge had left you
5 right there. But now you are here. So why would you even
6 propose to me, counsel, that I even think for a minute about
7 something like that? How can I do that? What is on your
8 mind?

9 MR. PATNAIK: That was meant to address the fact
10 that these cases are in different postures, because the
11 North Carolina matter had progressed. We were already
12 through claim construction. We were starting expert
13 depositions for claim construction. The parties had
14 exchanged constructions as well as extrinsic evidence.

15 So given that it was that far ahead, we thought
16 we would try to maintain that track.

17 THE COURT: In the two actions, there are
18 different patents. Right? Different accused products?

19 MR. PATNAIK: That's correct, Your Honor.

20 THE COURT: In the 317 versus the 139. Do you
21 agree with that, HTC?

22 MR. SCHNURER: Your Honor, no, we disagree.
23 There is no overlap in patents. But the same products are
24 accused.

25 MR. PATNAIK: Your Honor, may I add some

1 clarification?

2 THE COURT: Yes.

3 MR. PATNAIK: There may be overlap in products,
4 Your Honor. But the claims of the patents are addressing
5 different features of functionality. From prior experience
6 with HTC in other litigations, different people will be
7 deposed about different functionality of the products.

8 I think the overlap is a little overstated.

9 THE COURT: Well, that's impossible for me to
10 discern from my vantage point at this stage of the
11 litigation, as to who has the better of the arguments there.

12 But it strikes me that the defendants' proposal,
13 as a practical matter, is the only one that I can and am
14 willing to accommodate. That is that these matters be put
15 together, the 139 and the 317, at least for purposes of
16 pretrial matters. That's what we are going to do.

17 Again, thinking about the schedule, and when I
18 would first be able to bring the first case to trial, that
19 wouldn't be, quite frankly -- let me find where I have my
20 notes on that, among your 60 pages -- October 17th, 2016.
21 So the final proposed, joint final proposed pretrial order
22 will be due by the close of business August 29th, 2016.

23 Counsel for plaintiff, I am going to direct that
24 you prepare the case management order, and have it filed by
25 June 23rd, please.

1 The pretrial conference will occur in Wilmington
2 on 9/19/2016, beginning at 10:00 in the morning.

3 I don't know that we can have a meaningful
4 discussion about the number of days for trial in this
5 matter, regardless of which one we are talking about, or
6 maybe you differ. Maybe you have had a chance to actually
7 meet and confer and get something done.

8 Is there a common view, plaintiff, on how many
9 days these matters should take?

10 MR. PATNAIK: No, Your Honor. There is not. I
11 think it may make sense to defer on the number of days for
12 trial at this point.

13 THE COURT: Anybody for the defendants want to
14 be heard on this?

15 MR. SCHNURER: John Schnurer for HTC.

16 We would agree with FlashPoint. Given the
17 number of patents and the desire for focus and hopefully
18 dropping a patent and claims through the case, we have a
19 better idea of how many trial days would actually be
20 required.

21 THE COURT: Before I forget, there is a
22 difference in the two schedules that I failed to note at the
23 outset, I think. You can correct me if I am wrong, counsel,
24 because I well might be. I see in the joint status report
25 on the 139 action, under Defendants' Proposed Dates,

1 provision for summary judgment briefing regarding Palm
2 Licensing Defenses. Does somebody want to be heard on what
3 this is all about?

4 MR. PLIMACK: Your Honor, Michael Plimack for
5 Palm.

6 Palm was acquired by HP. HP has a license to
7 all these patents. It is our view that by virtue of that
8 acquisition, so does Palm.

9 It is a straight issue of law under the
10 acquisition agreement, the license agreement. At the
11 parties' mediation with Judge Thyng, there was general
12 agreement that this should be teed up for an early
13 resolution because it is a pure issue of law. So we had
14 that in the schedule for early determination by the Court.
15 If Your Honor's schedule allowed, we were hoping to get a
16 hearing on that decision in the near future, because that
17 could get us out of the case.

18 THE COURT: I don't have time to give you a
19 hearing, counsel. Let me not hold out false hopes on that.
20 I will decide the matter on the papers.

21 MR. PLIMACK: Thank you, Your Honor.

22 THE COURT: Is there an objection from the
23 plaintiffs to including this?

24 MR. PATNAIK: Your Honor, no objection. We are
25 amenable to it.

1 Just for context, none of the disagreement --
2 the retroactive applicability of that license, and that's
3 what will be briefed by both parties.

4 THE COURT: You agree this is purely a question
5 of law, and that if decided in favor of the moving party,
6 namely Palm or HP, whoever owns them now or acquired them,
7 that they would be out of the case?

8 MR. PATNAIK: We agree, Your Honor.

9 THE COURT: I don't have a problem with your
10 briefing schedule, Palm. I will tell you that I am not
11 going to get to this in the summer. It's not going to
12 happen. But you go right ahead and brief, and I will get to
13 it as soon as humanly possible to do so. Okay?

14 MR. PLIMACK: Thank you, Your Honor. We
15 appreciate it.

16 THE COURT: Now, let me page over here. Hold on
17 a second.

18 I am going to work from the status report in
19 14-317, because in that case on the same pages, at least, I
20 can see the differing proposals side by side.

21 As I said earlier, I am going -- or maybe didn't
22 say but I am going to make clear now -- I am going to adopt
23 the defendants' proposed dates here. And I want to discuss
24 just for a moment the Identify Asserted Claims and Allegedly
25 Infringing Products and Deadline to Amend Pleadings, one box

1 line where FlashPoint proposes October 3 and defendants say
2 not applicable.

3 So let's begin with plaintiff.

4 MR. PATNAIK: Yes, Your Honor.

5 THE COURT: You have proposed a deadline to have
6 this activity completed. I gather the defendants don't
7 believe it is necessary.

8 MR. SCHNURER: That's correct, Your Honor. This
9 is John Schnurer.

10 MR. PATNAIK: Your Honor, I can speak to what we
11 think the basis for it is. With respect to HTC -- HTC is
12 introducing new products on a rolling basis. We were trying
13 to be as close to realtime as possible with an
14 identification or a list of products at issue.

15 THE COURT: Is there a reaction?

16 MR. SCHNURER: So in the transfer -- Your Honor
17 said the cases would be consolidated. But with respect to
18 the transferred patents, they already identified the claims
19 and the accused products. So there is going to be a time by
20 which no more new claims and no more new products are going
21 to be added to the case.

22 In the original consolidated action, that time
23 expired a long time ago. So we are just trying to know what
24 our case is and move forward. And FlashPoint, it seems to
25 be a constantly evolving case for them. Enough is enough.

1 And we want to move forward and move forward with the Court.

2 MR. PATNAIK: That is why we picked a date
3 certain in the proposed schedule. Obviously, a lot has
4 happened since the consolidated case was stayed.

5 THE COURT: I am going eliminate the line that
6 says, Identify asserted claims and allegedly infringing
7 products and deadline to amend pleadings.

8 All the other dates that are proposed by the
9 defendants are fine.

10 I have already given you a pretrial order due
11 date, a pretrial conference date and a trial date. I
12 neglected to set a date for our Markman hearing. I am going
13 to put you on hold. Hold on.

14 (Pause.)

15 THE COURT: Does anybody on the line have any
16 sense at all about how much time we are going to need for
17 Markman in these cases?

18 MR. PUTNAIK: Your Honor, given that we are
19 making the schedules the same, I am assuming, but I don't
20 know for certain, that all 16 patents will be addressed in
21 the same Markman?

22 THE COURT: We can discuss that.

23 MR. PUTNAIK: I think that would be pretty
24 onerous for everyone concerned, to try to address all of
25 them at one Markman.

1 THE COURT: Certainly for me it would. Have you
2 talked about a proposal among yourselves, plaintiffs on the
3 one side, defendants on the other?

4 MR. PATNAIK: No, Your Honor. That was our
5 attempt to keep the cases separate. But I understand now
6 they are on the same track. We would recommend separate
7 Markmans for the two matters, Your Honor.

8 THE COURT: Why not, counsel, discuss the
9 alternative? In the event that Judge Sleet doesn't agree
10 that the cases shouldn't be severed, why haven't you
11 prepared, counsel on both sides, to talk with me about a
12 reasonable proposal for Markman, which is, after all, a
13 significant event in the life of these cases?

14 MR. PATNAIK: Apologies, Your Honor. We were
15 working towards trying to get these reports together and we
16 didn't address the Markman issue in case they were
17 consolidated.

18 THE COURT: So when you say separate Markmans,
19 counsel, what are you suggesting?

20 MR. PATNAIK: Your Honor, at least two separate
21 hearings. Given there are six patents that are completely
22 unique for HTC, two separate Markman schedules with respect
23 to the patents, the two groups of patents.

24 THE COURT: Does HTC concur that it would be
25 more efficient to set your patents off separate from the

1 other defendants and have your own Markman?

2 MR. SCHNURER: Well, what's most -- what is most
3 important is your schedule. There are patents that overlap
4 asserted by HTC that are also asserted against other
5 defendants, just having HTC argue those claims would be --
6 but we do agree, given the number of patents in total, at
7 least two separate times, if your schedule permits, or
8 perhaps three, to address all the patents. But we are
9 hoping with the narrowing of the claims, HTC has proposed a
10 narrowing of the claims to be asserted as well as the number
11 of claim terms to be construed, if we could get to that --
12 yes, Your Honor.

13 THE COURT: Sure. That should certainly be on
14 the table for discussion, the narrowing of claims and
15 asserted elements, yes.

16 MR. SCHNURER: So we feel it could be done at
17 two separate times. Thinking outside the box, four hours if
18 we can get two separate days, four hours to six hours,
19 totals, split between the parties, that should do it. I am
20 thinking like eight to ten hours.

21 THE COURT: Okay.

22 MR. SCHNURER: Hopefully less. It all comes
23 down to whether FlashPoint stands on the claims it has
24 asserted and how much it is going to narrow things.

25 THE COURT: At the present time we have 16

1 patents?

2 MR. PATNAIK: Yes, Your Honor.

3 THE COURT: Do we know how many claims are being
4 asserted from those patents?

5 MR. PATNAIK: In total, Your Honor, the issue
6 was still ripe from us that given the number of products
7 that have come out since the stay was issued, we were going
8 to seek to amend which patents are being asserted against
9 which defendants in the consolidated case, given the
10 introduction of new products since the stay was instituted.
11 So that issue is a little bit in flux.

12 MR. SCHNURER: Your Honor, I will just try to
13 flag it. But I believe there are a significant number of
14 claims already presently asserted, at least against HTC.

15 I am just trying to find the page that breaks it
16 down by the patents.

17 MR. PATNAIK: Page 12 on the consolidated
18 report.

19 Plaintiff does break it down by patents. It
20 does not provide a number of claims per patent.

21 On Page 16 of the consolidated report, Your
22 Honor -- this is HTC -- we identify the number of claims.
23 This is -- in the transferred case, 16 claims were asserted.
24 While in the consolidated, the 139 action, 38 claims were
25 asserted.

1 In that section, we outline a proposal for
2 reduction of the scope of the case.

3 THE COURT: I am just reading, counsel. Hold on
4 a second.

5 (Pause.)

6 Was there a discussion of your proposal, HTC?

7 MR. SCHNURER: While we had a lot of
8 back-and-forth on this, we tried to have a discussion, my
9 understanding from FlashPoint is that, frankly, I never got
10 a clear idea of what their idea is on moving the case, just
11 a high-level desire to.

12 MR. PATNAIK: Your Honor, we are amenable to
13 claim reductions with the corresponding reduction in prior
14 art references. What we were waiting for was guidance as
15 far as whether these two tracks will be together or not.
16 But you have already answered that, Your Honor.

17 To answer your question, we are amenable to
18 reductions and deadlines for reductions of claims as well as
19 prior art references.

20 THE COURT: Is that something that should be put
21 on the schedule, gentlemen?

22 MR. SCHNURER: Your Honor, we would like to have
23 that in the schedule.

24 THE COURT: Plaintiff?

25 MR. PATNAIK: We agree.

1 THE COURT: Okay. I will leave that to you,
2 gentlemen, to discuss offline. Include it in the schedule.

3 Let me go back to the computer and see if I can
4 find two separate days to handle the Markmans. I think your
5 proposals make sense in this regard. I will be right back.

6 (Pause.)

7 MR. SCHNURER: Your Honor, we already had it in
8 our proposed schedule, regarding those two dates to narrow
9 the case.

10 THE COURT: Okay. Let's see.

11 That's fine. There is no need to discuss it
12 further then.

13 I will be right back.

14 (Pause.)

15 The best I am able to do, counsel, given the
16 proposed date for the completion of briefing, is -- let me
17 make sure I have the dates right. Hold on.

18 July 7 and July 9, beginning at 9:30.

19 I think that we have now accounted for all the
20 dates that have been proposed and now adopted by the Court.
21 We have agreed that it's premature to talk about length of
22 trial and order of trial and the like.

23 Settlement-wise, I am still a little at sea
24 whether you think you would benefit from referral to a
25 Magistrate Judge or not. Plaintiff?

1 MR. PATNAIK: Your Honor, we believe it would be
2 fruitful and useful. We have been trying to get to a
3 mediation, Your Honor. It just hasn't happened yet.

4 THE COURT: Whomever would like to speak on
5 this? I am not limiting the defendants in any way. Who
6 wants to speak first on this?

7 MR. SCHNURER: Your Honor, we are up for a
8 mediation.

9 THE COURT: Let me put it this way. Among the
10 defendants, anyone who feels that it would not be a useful
11 exercise?

12 MR. PLIMACK: Your Honor, for Palm.

13 We have already been to mediation with Judge
14 Thynge, which I believe I mentioned. So the upshot of that
15 was to have our summary judgment motion, which I mentioned.

16 THE COURT: I understand that. You are a little
17 different in that regard.

18 I am going to go ahead and direct that you put a
19 referral paragraph or sentence in the scheduling order
20 referring it to the Magistrate Judge. It will be Chief
21 Judge Thynge in all likelihood.

22 Anything else, counsel, that I may have
23 overlooked in either of the status reports?

24 MR. PATNAIK: Your Honor, one issue. HTC has as
25 of last week put two of the transfer case patents into an

1 IPR. They petitioned for the request. And I think they are
2 seeking to stay both actions now based on that IPR. We
3 believe that would be improper, Your Honor.

4 THE COURT: Has a motion been filed yet?

5 MR. PATNAIK: No, Your Honor. It's been
6 reference in their joint report.

7 THE COURT: I saw that. I think, actually,
8 there was a mention at the last time we got on the phone
9 that there were going to be more patents placed into the IPR
10 process. But only two right now. Go ahead.

11 MR. SCHNURER: Your Honor, yes, Your Honor. So
12 there is one patent, the '726 patent, that is in an inter
13 partes reexam. It is at the board of the PTO. Then two
14 additional patents were placed -- well, at least a petition
15 was filed last week. An additional one was just filed last
16 night and we are filing it today.

17 As I had indicated to you at the last status
18 conference, we are going to get all six filed. So we have
19 got two more to do in the next couple weeks. At that point
20 in time, we request to move to stay the case.

21 THE COURT: You can move. I don't have a view
22 at this time. We are going to proceed forward now and
23 continue to proceed forward until I resolve whatever motion
24 or motions there are that might be filed.

25 UNIDENTIFIED SPEAKER: Yes, Your Honor.

1 THE COURT: After they are fully briefed.

2 There was mention of a -- none of the actions in
3 this case are stayed at the present time. Right?

4 MR. SCHNURER: That's correct, Your Honor.

5 THE COURT: I didn't think so. Somebody said
6 something that gave me the impression that I had stayed
7 something in one of these actions. I didn't think that was
8 the case.

9 Anything else, counsel?

10 All right, counsel.

11 (Conference concluded at 10:38 a.m.)

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13 Reporter: Kevin Maurer

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